

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**CITY OF GALLUP, NEW MEXICO,
On Behalf of Itself and All Other
Similarly Situated New Mexico
Municipalities,**

Plaintiff,

vs.

Civil No. 07 - 644 JEC/RLP

HOTELS.COM, L.P., et al.,

Defendants.

ORDER

THIS MATTER comes before the court on the Motion of the Orbitz Defendants for Leave to File Amended Affirmative Defenses. (Docket No. 165). For the reasons stated herein, the court grants the Motion.

A. Background

The Orbitz Defendants seek to amend their Answers to include three additional affirmative defenses:

Twenty-First Affirmative Defense (Double Taxation): Imposition of the taxes sought by Plaintiff would result in double taxation which is disfavored by New Mexico Law.

Twenty-Second Affirmative Defense (Failure to Join Indispensable Parties): Plaintiff has failed to join all indispensable parties for adjudication of the claims or requests for relief averred in the First Amended Complaint, including the hotel/lodging operators or guests who may be obligated to pay the taxes purportedly at issue in this case.

Twenty-Third Affirmative Defense (Requests for Attorney's Fees is Unauthorized): Plaintiff's request for attorney's fees is unauthorized, contrary to public policy and/or prohibited by applicable law.

This action was filed on July 6, 2007. Pursuant to the Scheduling Order entered November

14, 2007, discovery was initially limited to the issue of certification of the Plaintiff class. The District Court granted Plaintiff's Motion for class certification on July 7, 2009. On September 22, 2009, Plaintiff filed a motion for Partial Summary Judgment addressing the issues of liability and the statute of limitations, and further requesting imposition of a constructive trust. (Docket No. 166). Plaintiff filed an Amended Motion for Partial Summary Judgment on the same grounds on November 6, 2009. (Docket No. 185). Defendants filed their response on November 13, 2009. (Docket No. 188).

The parties are scheduled to appear before this court on December 16, 2009, for a Rule 16 Scheduling Conference to establish case management deadlines addressing the merits of this case.

B. Discussion

Fed.R.Civ.P. 15(a) provides for liberal amendment of pleadings. "The purpose of the Rule is to provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." **Minter v. Prime Equip. Co.**, 451 F.3d 1196, 1204 (10th Cir.2006) (quotations and citation omitted). Leave to amend is discretionary with the court. **Foman v. Davis**, 371 U.S. 178, 182 (1962); **Viernow v. Euripides Dev. Corp.**, 157 F.3d 785, 799 (10th Cir.1998). Amendment under the rule is to be freely granted when justice so requires. **Castleglenn, Inc. v. Resolution Trust Company**, 984 F.2d 1571, 1585 (10th Cir.1993). "If the underlying facts or circumstances relied upon by a [party] may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." **Foman**, 371 U.S. at 182. "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." **Frank v. U.S. West, Inc.**, 3 F.3d 1357, 1365 (10th Cir.1993).

Plaintiff argues that the proposed amendments are futile, and further objection to the motion

asserting undue delay, dilatory motive and undue prejudice.

After careful review of the briefing, and considering that leave to amend shall be freely given, the court finds that Defendants' motion should be granted. Discovery deadlines applicable to the merits of this case have not been set. Accordingly, Defendants have filed their Motion to Amend prior to any deadline that will be established in the Scheduling Order. All parties will have ample opportunity to seek factual information regarding all assertions in the three additional affirmative defenses.

IT IS THEREFORE ORDERED and the Motion of the Orbitz Defendants for Leave to File Amended Affirmative Defenses be and hereby is **GRANTED**.



RICHARD L. PUGLISI
United States Magistrate Judge